U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ISRAEL ALMARAZ and DEPARTMENT OF THE ARMY, ARMY DEPOT, Corpus Christi, TX

Docket No. 00-1456; Submitted on the Record;
Issued June 20, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's application for review was untimely and failed to present clear evidence of error.

On July 23, 1998 appellant, then a 39-year-old hydraulic mechanic, filed a traumatic injury claim, alleging that on June 11, 1998 he sustained pain and numbness in his left upper extremity from his shoulder to his hand when using a torque wrench. Appellant did not stop work.

By letter dated August 3, 1998, the Office advised appellant that the evidence submitted to support his claim was insufficient and requested additional factual and medical evidence.

Appellant submitted a report dated June 23, 1998 in which Dr. David N. Parker, a Board-certified orthopedic surgeon, provided a history of the June 11, 1998 employment incident and noted appellant's complaints. Dr. Parker stated his objective examination findings and restricted appellant from work for two weeks. In a July 7, 1998 report, Dr. Parker stated that appellant complained of dorsum numbness in his index and long fingers and that he had wrist and shoulder problems. He opined that appellant needed to continue working and stated: "I think he does need to have his shoulder checked out because that is probably what is causing his problem in the left hand now."

By decision dated September 3, 1998, the Office denied appellant's claim on the grounds that the evidence of record failed to establish fact of injury. The Office accepted that appellant experienced the June 11, 1998 employment incident, but found that the evidence did not show that he sustained a diagnosed medical condition causally related to that incident.

By letter dated January 13, 2000, appellant requested reconsideration. He submitted progress notes dated December 14 and 16, 1999 from "R. Bruno" diagnosing a rotator cuff injury. Appellant also submitted work release forms dated December 14 and 21, 1999 from Dr. Walter A. Del Gallo, a Board-certified orthopedic surgeon, advising that appellant could return to light-duty work. A December 14, 1999 note from Dr. Del Gallo diagnosed left shoulder impingement syndrome and prescribed magnetic resonance imaging.

By decision dated January 28, 2000, the Office denied appellant's reconsideration request.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. *Feltus B. Sterling, Jr.*, 49 ECAB 387, 388 (1998); 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Because appellant filed his appeal with the Board on March 23, 2000, the only decision before the Board is the one dated January 28, 2000. The Board has no jurisdiction to review the September 3, 1998 merit decision.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a).[5]

Appellant's reconsideration request dated January 13, 2000 was filed more than one year after the Office's September 3, 1998 merit decision. The Board, therefore, finds that the Office properly determined that the request was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[6] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[3] *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[4] 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[5] *Thankamma Mathews, supra* note 2 at 769; *Jesus D. Sanchez, supra* note 3 at 967.

[6] *Thankamma Mathews, supra* note 2 at 770.

limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] This entails a limited review by the Office to determine how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[12]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant but also raise a substantial question as to the correctness of the Office decision.[13] The Board must make an independent determination of whether a claimant submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[14]

The evidence submitted by appellant does not establish clear evidence of error because it does not raise a substantial question as to the correctness of the Office's most recent merit decision. Dr. Del Gallo's notes on appellant's work restrictions and left shoulder impingement syndrome are irrelevant. He failed to address the issue of whether appellant sustained a condition causally related to the June 11, 1998 employment incident. Similarly, the other documents submitted by appellant failed to establish clear evidence of error because they did not raise a substantial question as to the correctness of the Office's September 3, 1998 decision denying his claim.

As appellant failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of his case.

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[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[8] *Thankamma Mathews*, *supra* note 2 at 770.

[9] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[10] *Jesus D. Sanchez*, *supra* note 3 at 968.

[11] *Leona N. Travis*, *supra* note 9.

[12] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[13] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[14] *Gregory Griffin*, *supra* note 4 at 466.

The January 28, 2000 decision of the Office of Workers' Compensation Programs is affirmed.[15]

Dated, Washington, DC
June 20, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[15] The Board notes that appellant submitted evidence to the Board with his appeal. The Board, however, cannot consider this evidence as its review of the case is limited to the evidence of record, which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).